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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hawaii International Movers, Inc.

File: B-248131

Date: August 3, 1992

John L. Knorek, Esq., Torkildson, Katz, Jossem, Fonseca, Jaffe, Moore & Hetherington, for the protester.
Richard B. Oliver, Esq., McKenna & Cuneo for Gunn Van Lines, an interested party.

Elizabeth Rivera Bagwell, Esq., Department of the Navy, for the agency.

John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency improperly reopened competition to request third round of best and final offers (BAFO) after award where record does not support agency's argument that telephone request for information from awardee after second BAFOs had been received was necessary to determine combination of primary and backup proposals that would result in the lowest cost to the government; since the information requested was not necessary for this purpose, the request did not constitute improper discussions that warranted reopening the competition after award to afford the other offeror an additional opportunity for discussions.

2. Although reduction of total price in original awardee's second best and final offer (BAFO) without indication of line item(s) that were reduced rendered price ambiguous, original awardee's subsequent opportunity to specify line item price that was reduced did not constitute discussions that warranted reopening competition where its price already was low based on first BAFO and, aside from \$50,000 total price reduction, its second BAFO altered none of the terms of the first BAFO; since original awardee gained no competitive advantage from post-BAFO communication, and other offeror therefore was not prejudiced, there would be no benefit to the procurement system from reopening the competition after competitive positions were compromised by disclosure of original awardee's price.

DECISION

Hawaii International Movers, Inc. (HIM) protests the award of a contract to Gunn Van Lines under request for proposals (RFP) No. N00604-92-R-3113, issued by the Department of the Navy for household goods packing and crating services in Hawaii.

We sustain the protest.

The RFP, issued on October 30, 1991, contemplated the award of a requirements contract for a period of 1 year plus 2 option years. The RFP set forth estimated quantities for each line item of services; these estimates would be multiplied by unit prices furnished by offerors, and the resulting line item totals then would be aggregated for a total price for each of the three contract years. Award was to be made to the technically acceptable offeror that proposed the lowest price for the base and option years combined.

The RFP included a maximum daily requirement of 900 net hundred weight (NCWT) and a minimum acceptable amount of 350 NCWT. The RFP provided for multiple awards to cover the eventuality that the lowest priced proposal would not offer to provide the maximum daily requirement. In that event, in order to assure that the government's needs would be met, a primary award would be made to the lowest priced offeror, a secondary award would be made to the next low offeror, and so on, until the awards combined added up to at least the 900 NCWT maximum. Offers also could be conditioned so as to be considered only for the secondary or tertiary award. The RFP provided in section M1 that, if an offeror conditioned its proposal in this manner or proposed on less than the maximum daily requirement,

"The Government reserves the right to calculate the anticipated total costs of the procurement based on its best estimates of the actual usage . . . and to award the contract to the offeror whose offer, when taken with the necessary Secondary and Tertiary offers, results in the lowest total estimated cost to the Government of the entire procurement."

Five offerors submitted proposals limited to consideration for award of the secondary contract for schedule I (outbound services), the only one in issue here. Gunn's base period (\$2,624,740) and total (\$7,874,220) prices were lower than HIM's (\$3,133,275 and \$9,399,825) (the other offers are irrelevant). After receipt of these initial proposals, the agency issued amendment 0003 deleting the option periods

from the RFP and requesting best and final offers (BAFO) by December 26, 1991 for the base year alone. Gunn's BAFO increased its initially proposed base year price to \$3,450,175. HIM's BAFO did not change its price of \$3,133,275, and HIM thus became the low offeror. On December 31, in response to another offeror's agency-level protest (the details of which are not relevant here), the Navy issued amendment 0004 requesting that offerors submit second BAFOs by January 21, 1992. HIM's second BAFO lowered its price by \$50,000, to \$3,083,275; Gunn's new BAFO left its price unchanged at \$3,450,175.

HIM's second BAFO is the focus of the protest. It consisted of a brief cover letter acknowledging amendments 0004, 0005 and 0006, and copies of the amendments. The letter stated, in relevant part, that "[o]ur best and final offer for schedule I is \$3,083,275," but did not include an amended price schedule showing how the unit prices were affected by this reduction. This became a problem because HIM offered only the minimum daily requirement of 350 NCWT, that is, less than the 900 NCWT maximum daily requirement; a cost analysis under section M1 therefore was necessary to determine the combination of awards that would result in the lowest total cost to the government. The contracting officer determined, however, that she could not perform this analysis without unit prices showing the distribution of HIM's price reduction among the line items. The contracting officer therefore contacted the president of HIM on January 25. According to the agency, he stated that the \$50,000 reduction was due to a reduction of HIM's unit price for line item 0001A from \$35.00 to \$33.50. (Although it is not relevant to our decision, HIM disputes this account; it claims that the \$50,000 reduction was arbitrary and that the contracting officer actually was the one who suggested that the reduction be attributed to a change in the line item 0001A unit price.)

Since both Gunn and HIM had been found technically acceptable, the Navy made award to HIM based on its low price. On February 10, however, Gunn protested to our Office that the award was improper on the ground that the Navy's January 25 communication with HIM had constituted discussions, and that Gunn improperly had not been afforded the same opportunity for post-BAFO discussions. The contracting officer ultimately agreed with Gunn. On February 28, she advised HIM of the Navy's intention to reopen the competition, and faxed letters to HIM and Gunn requesting a third BAFO by February 29. Both firms responded: HIM increased its price by \$50,000 to \$3,133,275, while Gunn lowered its price to \$2,973,290, and thereby became the low offeror in line for the award. On March 4, HIM filed an agency-level protest challenging any

award to Gunn. That protest was denied by letter of March 18. On March 26, HIM filed this protest with our Office.

HIM maintains that the January 25 conversation between its president and the contracting officer constituted a clarification of its second BAFO, not discussions, and that there thus was no need to hold discussions with Gunn. This being the case, HIM concludes that reopening the competition for third BAFOs after HIM's award price had been disclosed served no other purpose than to create an improper auction.

The Navy adopts Gunn's protest argument that the communication with HIM's president constituted discussions because the unit price information solicited was necessary to evaluate HIM's proposal. Specifically, without knowing exactly what HIM's unit prices were intended to be after the \$50,000 reduction, the Navy found it could not determine what combination of primary, secondary and tertiary offers would result in the lowest cost to the government. The Navy concludes that it was proper to reopen the competition to give Gunn the same post-BAFO opportunity to revise its proposal.

Discussions occur when an offeror is given the opportunity to revise or modify its proposal (other than as a result of a minor clerical mistake) or when information requested from and provided by an offeror is essential to determining the acceptability of the firm's proposal. See Federal Acquisition Regulation § 15.601; Aquasis Servs., Inc., B-240841.3, July 26, 1991, 91-2 CPD ¶ 94. Conducting discussions with one offeror generally necessitates conducting discussions with all offerors in the competitive range and giving those offerors the opportunity to submit revised proposals. National Med. Staffing, Inc., B-242585.3, July 1, 1991, 91-2 CPD ¶ 1. As distinguished from discussions, a request for clarification is merely an inquiry to an offeror for the purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in its proposal. See Federal Acquisition Regulation § 15.607; FCC.O&M, Inc., B-238610.2, July 20, 1990, 91-1 CPD ¶ 26.

We do not think the January 25 communication with HIM's president constituted discussions that warranted reopening the competition after disclosure of HIM's price. On this record we find no support for the fundamental premise of the Navy's argument--that it was unable to perform the cost analysis under section M1 without HIM's current unit prices. This clause, quoted above, set forth a two-step process: (1) the government would calculate the estimated total cost of the procurement based on its best estimates of actual usage; and (2) that offer would be selected for award that,

when taken with the necessary secondary and tertiary offers, would result in the lowest cost for the procurement. It is not apparent how updated unit prices were essential for either step. As for step one, since the RFP included estimated quantities for each line item, and offerors' total prices were derived by first multiplying those quantities by a unit price and then adding the totals for all line items, HIM's total price already reflected the government's estimates of actual usage.¹ Similarly, step two speaks only in terms of considering combinations of the primary, secondary and tertiary offers submitted--that is, the total prices, not unit prices within the offers--in determining the lowest cost to the government. Since HIM's total price was clear, it could have been evaluated under this second step.

Significantly, the Navy has provided no explanation (besides a recitation of the language of the provision) of what the cost analysis under section M1 was to entail, and has furnished no documentation showing how this analysis was performed using unit prices after either the initial award to HIM or the ultimate award to Gunn. We conclude, based on this record and our reading of the RFP, that HIM's unit prices were not necessary for the section M1 cost analysis; that the requested unit price information was not necessary to evaluate HIM's proposal or to determine the firm's acceptability; and that the January 25 communication therefore did not constitute discussions.

We note (although the agency does not argue) that HIM's failure to provide updated unit prices in its second BAFO did render its price ambiguous. While this ambiguity ordinarily would be suitable for clarification through the negotiation process, it did not warrant reopening discussions here.² In this regard, HIM's first BAFO price

¹Section M1 references Appendices F and G as the best estimates of actual usage, not the estimates listed next to each line item. It is not clear how the two estimates differ, except that the NCWT quantities in the appendices are monthly figures taken directly from two prior contracts, while the line item estimates are annual quantities. Our analysis here assumes that the line item estimates are valid, based on the statement on page 23 of the RFP, under the heading "Estimated Quantities," that "[t]he quantities shown for each item in this solicitation are the Government's estimates of requirements which may be ordered during the basic period of the contract."

²Moreover, we do not think the failure to resolve such an ambiguity through discussions would preclude a proposal from being considered for award. We have held in the context of

was low even without the \$50,000 reduction in its second BAFO. Since the second BAFO did not change the unit prices or otherwise alter the terms of the first BAFO, the \$50,000 reduction gave rise to uncertainty only as to how low the unit prices were intended to be in the second BAFO. In other words, HIM gained no competitive advantage over Gunn from its opportunity to specify that the \$50,000 reduction was intended to be reflected in a certain line item price, and Gunn therefore was not prejudiced by HIM's doing so.

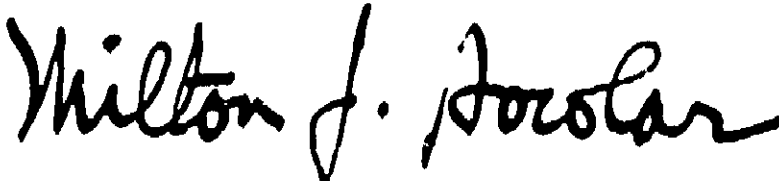
The risk of an auction generally is secondary to the need to preserve the integrity of the procurement system through corrective action. Ford Aerospace Corp., et al., B-239676.2 et al., Mar. 8, 1991, 91-1 CPD ¶ 260. However, where, as here, the record establishes that there was no actual impropriety in the award, or that any impropriety did not result in prejudice to offerors, there would be no benefit to the procurement system that could justify reopening a competition after offerors' competitive positions have been compromised by disclosure of the awardee's price. BDM Int'l, Inc., 71 Comp. Gen. 363 (1992), 92-1 CPD ¶ 377; National Medical Staffing, Inc., B-242585.3, July 1, 1991, 91-2 CPD ¶ 1. We conclude that there was no proper basis for reopening the competition after award to HIM.

Accordingly, we sustain the protest. By letter of today to the Acting Secretary of the Navy, we are recommending that

sealed bid procurements that an ambiguity as to price does not require rejection of a bid if it is low under all possible interpretations; the intended price can be verified after bid opening. The Ryan Co., B-238932, June 13, 1990, 90-1 CPD ¶ 557. Just as such a verification does not constitute an improper late bid modification, since HIM's price was low with or without the \$50,000 reduction, we see no reason why the agency could not have obtained it outside of the discussions process, any time prior to award.

HIM's award be reinstated. We also find HIM entitled to reimbursement of its costs of filing and pursuing the protest, including reasonable attorneys' fees.³

The protest is sustained.

for 
Comptroller General
of the United States

³As part of its requested relief, HIM seeks lost profits from the termination of its contract. There is no legal basis for allowing recovery of such costs. See Dand Indus., B-244216; B-244255, Aug. 23, 1991, 91-2 CPD ¶ 193.